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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

DONALD J. DIESEN,
Petitioner-Cross-Respondent,

vs.

JOHN HESSBURG, THOMAS DALY,
AND THE DULUTH NEWS-TRIBUNE,
Respondents-Cross-Petitioners.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

In the event this Court grants petitioner's petition for a writ of certiorari to the Minnesota Supreme Court,

And if this Court believes the Minnesota Supreme Court erred as to the liability portion of this case,

Then the questions presented by this cross-petition are:

a. Whether the First and Fourteenth Amendments allow punitive damages in a case of libel by implication brought by a public official against a newspaper; and

b. If yes, whether the First and Fourteenth Amendments allow the amount of punitive damages awarded here.

PARTIES TO THE PROCEEDING

Respondent-cross-petitioner John Hessburg ("reporter") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as a newspaper reporter. He now lives and works in Seattle, Washington.

Respondent-cross-petitioner Thomas Daly ("editor") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as the newspaper's executive editor. He now lives and works in Napa, California.

Respondent-cross-petitioner *Duluth News-Tribune* ("newspaper") is a daily newspaper of general circulation serving, among other areas, northeastern Minnesota, including Carlton County, Minnesota.

Petitioner-cross-respondent Donald J. Diesen ("Mr. Diesen") was at the relevant time the duly elected County Attorney for Carlton County, Minnesota. He concedes he was a public official as that phrase is used in First Amendment libel law. Petition at ii. He currently lives and works as a private attorney in Carlton County, Minnesota.

RULE 29.1 STATEMENT

Respondent-cross-petitioner *Duluth News-Tribune* is a division of Northwest Publications, Inc. which is wholly owned by Knight-Ridder Newspapers, Inc.

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**OPINIONS AND
PROCEEDINGS BELOW**

Petitioner's appendix contains the relevant documents from the proceedings below:

1. Jury's Special Verdict Form, unpublished, petitioner's app. at 72A.
2. Trial Court's Order and Memorandum granting the newspaper judgment notwithstanding the verdict, unpublished, petitioner's app. at 62A.

3. Opinion of the Minnesota Court of Appeals, 437 N.W.2d 705, petitioner's app. at 48A.

4. Order of the Minnesota Supreme Court granting further review, 442 N.W.2d 781, petitioner's app. at 70A.

5. Opinion of the Minnesota Supreme Court, 455 N.W.2d 446, petitioner's app. at 1A.

6. Order of the Minnesota Supreme Court denying rehearing, unreported, petitioner's app. at 71A.

JURISDICTIONAL STATEMENT

As demonstrated in the newspaper's brief opposing Mr. Diesen's petition, this Court lacks jurisdiction due to the absence of a federal question. Should this Court disagree, then the newspaper invokes the First and Fourteenth Amendments, as well as 28 U.S.C. § 1257(a), to establish this Court's jurisdiction.

The newspaper seeks review of that portion of the decision of the Minnesota Supreme Court declining to address the jury's punitive damage award. The state high court decision was handed down on May 11, 1990, and Mr. Diesen's petition for rehearing was denied on August 29, 1990.

The newspaper also relies on Sup.Ct.R. 12.3. The newspaper's counsel received Mr. Diesen's petition for writ of certiorari on November 28, 1990.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

U.S. Const. amend. XIV, § 1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minn. Const. art. I, § 3, provides that "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

STATEMENT OF THE CASE

The newspaper will not repeat here what appears in the Statement of the Case section of its brief opposing Mr. Diesen's petition. For purposes of this cross-petition the following background will suffice.

In its Special Verdict Form the jury awarded Mr. Diesen \$500,000 for punitive damages. Petitioner's app. at 73A. The trial court granted the newspaper judgment notwithstanding the verdict, petitioner's app. at 62A, thus voiding the punitive, as well as compensatory, damage awards. Mr. Diesen then appealed to the Minnesota Court of Appeals from the judgment against him.

At that stage of the proceedings no final order or judgment adverse to the newspaper had been entered with respect to punitive damages or any other matter. Minnesota's appellate rules allow an appeal only from an order or judgment. Minn.R.Civ.App.P. 103.03. Minnesota law does not allow appeal from an interstitial fact finding. *Id.*; *Johnson v. Am. Economy Ins. Co.*, 419 N.W.2d 126, 128, n. 1 (Minn.Ct.App. 1988); cf. *Walsh v. Kuechenmeister*, 196 Minn. 483, 492, 265 N.W. 340, 344 (1936) (an appellant must be "an 'aggrieved party,' and he cannot complain of errors that . . . did not operate to his disadvantage." [citations omitted]). Therefore the newspaper had no vehicle by which to appeal the jury's punitive damage award to the Minnesota Court of Appeals.

Nor could the newspaper obtain review of the award through a notice of review, the Minnesota equivalent of a cross-appeal. Minn.R.Civ.App.P. 106. Again, that rule allows review only of an adverse "judgment or order." *Id.*; *Johnson v. Am. Economy Ins. Co.*, *supra*. Thus the case went to the Minnesota intermediate appellate court solely on Mr. Diesen's appeal.

That court reversed the trial court and reinstated the jury's verdict, including the punitive damage award. *Diesen v. Hessburg*, 437 N.W.2d 705, 712 (Minn.Ct.App. 1989). Without having had any opportunity to obtain appellate review of the issue, the newspaper was facing a one-half million dollar punitive damage award. The newspaper therefore raised the issue in its appeal to the Minnesota Supreme Court. Both its initial and reply briefs to that court addressed the propriety and amount of punitive damages.

In the Minnesota Supreme Court the newspaper attacked the punitive damage award on several grounds, including federal grounds. At pages 45-46 of its original brief to the state high court the newspaper said:

The United States Supreme Court, in *Gertz v. Robert Welch, Inc.*, *supra*, discussed the unique relationship between a libel case and punitive damages. . . . In light of the United States Supreme Court's concern over punitive damages in a libel case, appellants call upon this court to hold that public officials suing media defendants for libel by innuendo based on a publication addressing matters of public concern cannot recover punitive damages. . . . The availability of punitive damages will significantly chill the exercise of First Amendment rights.

The Minnesota Supreme Court held that Minnesota law did not recognize Mr. Diesen's libel by implication theory. *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990). It reversed the Minnesota Court of Appeals and reinstated the trial court's judgment notwithstanding the verdict. *Id.*, 455 N.W.2d at 454. That decision mooted the punitive damage issue. The Minnesota Supreme Court said:

Although the propriety of the punitive damages award was briefed and argued by the parties, ruling as we do, we need not reach that issue.

Id.

REASONS FOR GRANTING THE CROSS-PETITION

If this Court grants Mr. Diesen's petition then fundamental fairness requires that this cross-petition be granted as well. Neither Minnesota appellate court reviewed the jury's punitive damage award. If the verdict is to be reinstated in any fashion then the punitive damage award will be ripe for review under state law. No litigant should have to pay any damages, much less one-half million dollars in punitive damages, without the appellate review to which the litigant is entitled as a matter of right. The newspaper respectfully suggests a remand to the state supreme court to take up the issue under state law if this Court recognizes the underlying theory of liability.

In the alternative, this Court should review the punitive damage award because it poses important federal questions. In libel cases against the media this Court has expressed First Amendment free speech and press concerns about punitive damage awards. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), this Court found "no justification" under the First Amendment for punitive damage awards under state law. Such awards tend to cause "media self-censorship." *Id.* Instead, this Court requires proof of actual malice by clear and convincing evidence even if the plaintiff is only a private figure. *Id.*; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (concern over punitive damage award's "effect on speech at the core of First Amendment concerns").

As for civil cases generally large punitive damage awards implicate the Fourteenth Amendment's guarantee of due process. This Court has noted:

[W]e have never addressed . . . whether due process acts as a check on undue jury discretion to award punitive damages . . .

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., ___ U.S. ___, 109 S.Ct. 2909, 2921 (1989). In their concurring opinions in *Browning-Ferris* Justices Brennan, Marshall, Stevens and O'Connor expressed concerns about unbridled punitive damage awards depriving a party of due process. *Id.*, ___ U.S. at ___, 109 S.Ct. at 2923-4.

Mr. Diesen could recover substantial punitive damages not for any express statement by the newspaper but instead for an unspoken and unprinted implication that some readers might draw. To a large extent the newspaper's alleged wrongdoing was out of its control and in the hands of some readers' perceptions. A punitive damage award in a case of alleged libel by implication raises serious and important First Amendment questions because of the self-censorship that surely would follow. Serious and important Fourteenth Amendment due process questions also arise because of the jury's limitless discretion to punish for implied rather than express defamation.

CONCLUSION

If this Court has jurisdiction and grants Mr. Diesen's petition, then this cross-petition must be granted as well. If this Court recognizes Mr. Diesen's theory of liability

then the case must be remanded to the state court to review the jury's punitive damage award under state law. In the alternative, this Court must address the important First and Fourteenth Amendment issues arising out of the jury's punitive damage award.

Dated: December 26, 1990

Respectfully Submitted,

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